

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Paging Network, Inc. and Arch)
Communications Group, Inc., for the)
Transfers of Control of their Radio Licenses)

WT Docket No. 99-365

To: Chief, Wireless Telecommunications Bureau

COMMENTS OF METROCALL, INC.

Metrocall, Inc. ("Metrocall"), by its attorneys and pursuant to the Wireless Telecommunications Bureau's (the "Bureau" or "WTB") Public Notice, DA 99-3028 (released December 30, 1999), hereby submits its comments in connection with the above-referenced transfer of control and waiver request proceeding (the "Application"). Metrocall's comments are limited to the waiver requested by transferee Paging Network, Inc. ("PageNet") and transferee Arch Communications Group, Inc. ("Arch") (collectively, the "Parties"), to exceed the Narrowband Personal Communications Service ("NPCS") spectrum aggregation limit under 47 C.F.R. § 24.101. In support hereof, the following is respectfully shown:

I. Statement of Interest.

Metrocall is a publicly traded company (NASDAQ symbol: MCLL) which, through its wholly-owned licensing subsidiary, Metrocall USA, Inc., is the third largest provider of paging services in the United States. Metrocall provides Commercial Mobile Radio Service ("CMRS") paging to approximately 5.5 million subscribers throughout the nation. Metrocall is also the licensee of nationwide NPCS Station KNKV203; it has timely met its first construction benchmark and notified the Commission of same.

Metrocall is thus a competitor of PageNet and Arch; indeed, it is the next largest company in the paging industry after the Parties to the subject transaction. As such, Metrocall has standing as a party-in-interest to submit these Comments.

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II. The Better Approach Would be to Repeal Section 24.101.

Section 24.101 of the Commission's Rules provides that no party may have an ownership interest in more than three NPCS licenses. 47 C.F.R. § 24.101(a). Upon consummation of the proposed merger, the combined Arch-PageNet entity (the "Combined Company") will hold a total of five of the twenty-six NPCS channels. See Application at 38-39.

Consequently, the Parties have requested a waiver of Section 24.101(a). In support of the requested waiver, the Parties provide evidence of the increasing competition faced by narrowband licensees in the paging and NPCS industries from broadband carriers. See Application at 42. Moreover, the Parties note that, because narrowband licensees have significantly less spectrum than their broadband competitors, and those broadband carriers frequently provide bundled messaging services for greatly reduced fees (if any), narrowband licensees require sufficient flexibility to provide new, innovative services. Id.

Metrocall certainly does not disagree with the Parties' assessment of competition in the messaging industry. Narrowband messaging carriers alone constitute the most intensively competitive sector of the telecommunications industry, with an average of 29 facilities-based paging carriers in the top markets. See, e.g., Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Fourth Report, FCC 99-136 at 46 (released June 24, 1999). Moreover, the messaging industry increasingly finds itself in competition with cellular, broadband PCS and digital, "enhanced" SMR ("ESMR") carriers, who can and do provide messaging services on the same handset used to provide two-way voice and data. See, e.g., id. at 41. The ability of narrowband carriers to respond to broadband competition is limited by the very nature of their narrow spectrum allocations; a 50 kHz NPCS channel simply does not have the bandwidth to provide the same services as the channel blocks authorized to cellular, broadband PCS, and ESMR licensees. In addition to the larger channel

designations, the 45 MHz broadband spectrum cap allows those carriers to accumulate up to 300 times more spectrum than does the 150 kHz NPCS cap.

As the Parties noted in their Application, the continued propriety of the NPCS aggregation limit is already before the Commission; the Further Notice of Proposed Rule Making concerning NPCS licensing specifically requested comment on the NPCS aggregation limit,¹ and several parties to that proceeding addressed the issue. See, e.g., Comments of PageMart, Inc. at 7-8 (filed June 18, 1997). Consequently, the Commission has already complied with the requirements of Section 553 of the Administrative Procedures Act for the repeal of this rule provision. See 5 U.S.C. § 553. As the analysis in and exhibits to the Application demonstrate, the wireless market has changed significantly since the adoption of Section 24.101 in 1994, and narrowband carriers no longer compete merely with each other, but with broadband mobile and fixed wireless service providers. The Commission has noted that wireless carriers compete with each other without regard to FCC service definitions, and since the adoption of Section 24.101 has found that inter-service competition to make in-service spectrum caps unnecessary. For example, in rejecting spectrum aggregation limits for the “lower 230” 800 MHz SMR channels, the Commission stated:

[T]he 800 MHz SMR service is just one of many competitive services in the CMRS marketplace. If a single licensee were to acquire all 230 channels in a single market, it would hold an aggregated 11.5 MHz of spectrum, not all of which would be contiguous. Even if a single licensee combined this spectrum with spectrum from the upper 200 channels, it would fall well short of the 45 MHz spectrum cap, and would have less spectrum than PCS and cellular providers in the same market. We do not believe that this level of aggregation would enable an SMR licensee to have an anticompetitive effect on the CMRS market. Moreover, we are concerned that limiting the ability of SMR providers to aggregate spectrum could handicap their efforts to compete with other services.

¹ *Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS; Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Narrowband PCS, Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd. 12972, ¶ 35 (1997) (“NPCS Further Notice”).

See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Second Report and Order, FCC 97-223, ¶ 25 (released July 10, 1997). The Commission's observations in that proceeding apply with even greater force here: even if a single licensee were to acquire all of the available, exclusive narrowband licenses (both paging and NPCS, not including the 1 MHz of reserve spectrum), that licensee would have a mere 6.5 MHz of spectrum - far less than the amount held by any singular cellular, broadband PCS or ESMR licensee with whom that narrowband licensee would compete.

Although Metrocall therefore agrees that the NPCS spectrum cap is no longer necessary to preserve competition, Metrocall nonetheless wishes to point out the inherent unfairness of relying on the waiver process to avoid the application of an outdated, counter-productive rule. All members of the messaging industry are subject to the same competitive pressures as PageNet and Arch; as a licensee of both paging and NPCS facilities, Metrocall experiences those same competitive pressures daily. Indeed, as the two largest companies in this industry, the Parties are arguably better able to withstand those pressures than many industry participants. Rather than granting these Parties a permanent or open-ended waiver, the Commission should repeal Section 24.101 by promptly issuing an order in response to the NPCS Further Notice, and afford the Parties only such limited relief as is necessary until that repeal becomes effective.

The Commission has an obligation to treat similarly-situated supplicants in a similar manner. Green County Mobilephone v. FCC, 765 F.2d 235, 238 (D.C. Cir. 1985). The Commission's broad discretion whether or not to waive its rules is not unlimited; administrative due process requires that, if a rule waiver is granted to one applicant and not another, the Commission have some principled reason for distinguishing between those applicants. *Id.* Metrocall respectfully submits that the circumstances advanced by Arch and PageNet - the need for industry consolidation and additional spectrum if narrowband carriers are to compete in today's wireless marketplace; the devaluation of NPCS spectrum; the inability for any party to

obtain an undue concentration of narrowband spectrum - are not unique to these Parties or this transaction. Should the Commission grant this waiver for the reasons proffered by Arch and PageNet, it will be hard-pressed to make principled distinctions among future merger applicants requesting waivers of Section 24.101(a).


Should the Commission decide to retain the NPCS cap, Metrocall respectfully submits that the Commission should require the Parties to divest two NPCS licenses and come into compliance with Section 24.101, but should give them sufficient time to do so. A reasonable period within which to divest the excess licenses is necessary to prevent a "fire sale" that could further depress the value of NPCS spectrum, and would be consistent with divestiture conditions that the Commission has placed on licensees in other services that acquired licenses in excess of the applicable spectrum aggregation or multiple ownership rules. *See, e.g., KRTH (AM)*, 67 RR 2d 935 (1990) (12-month waiver of broadcast multiple ownership rule to permit orderly divestiture); *US West, Inc. and Continental Cablevision, Inc.*, 11 FCC Rcd. 13260 (Cab. Ser. Bur. 1996) (temporary relief from cable-telco buyout restriction for periods of approximately 10 months and 18 months to permit divestiture of various cable systems). However, the Commission should not grant the Parties a permanent waiver of Section 24.101, if it continues to impose that rule on other narrowband licensees facing the same competitive pressures.

Conclusion

WHEREFORE, the foregoing premises considered, Metrocall respectfully requests that the Commission grant the Parties a limited waiver pending the outcome of its current NPCS rule making, and expeditiously release a decision in that proceeding repealing 47 C.F.R. § 24.101.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rhonda Johnson, legal secretary at the law firm of Alston & Bird, L.L.P., do hereby certify that on this 31st day of January, 2000, copies of the foregoing Comments of Metrocall, Inc. were sent by first class U.S. mail, postage prepaid, to the following:

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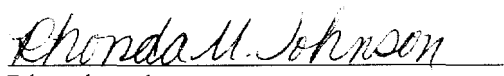
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